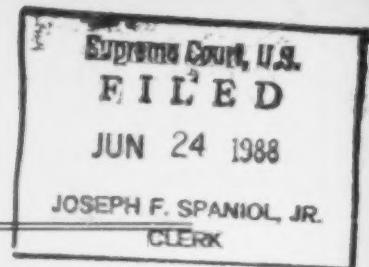


No. 87-1932



In The  
**Supreme Court of the United States**  
**October Term, 1987**

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PENNSYLVANIA ELECTRIC COMPANY,  
*Petitioner,*  
vs.  
  
CHARLES GUNBY, JR.,  
*Respondent.*

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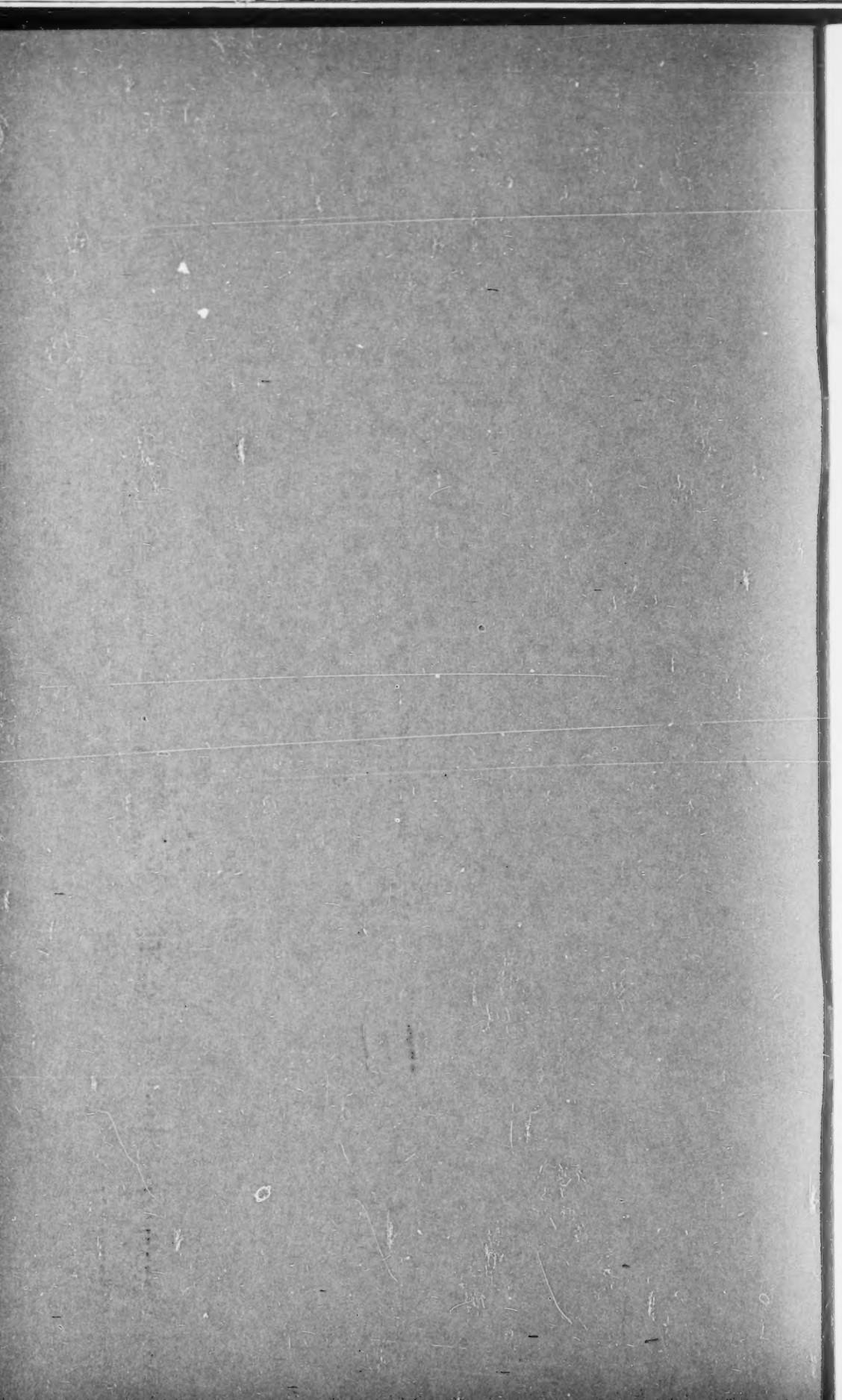
**BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT**

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## COUNTER-STATEMENT OF QUESTION PRESENTED

Where the Court of Appeals for the Third Circuit applies burden of proof standards set forth by the Supreme Court and its decision does not conflict with decisions of other Circuits, should that decision be reviewed?

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## COUNTER-STATEMENT OF THE CASE

Despite nine (9) years of commendable work as the person primarily responsible for the implementation of his employer's Equal Employment Opportunity/Affirmative Action (EEO/AA) program, Respondent, Charles Gunby (hereinafter "Gunby"), a black man, was passed over for a promotion to a newly-created management level EEO/AA position. The employer, Petitioner herein, Pennsylvania Electric Company (hereinafter "Penelectric"), instead gave the job to a white accountant who had no prior EEO/AA experience and whose employment evaluations were significantly lower than Gunby's.

Gunby filed suit against Penelectric in the United States District Court for the Western District of Pennsylvania setting forth claims under 42 U.S.C. §1981 and 42 U.S.C. §2000e-5 ("Title VII"). A jury returned a verdict in Gunby's favor on the §1981 claim. The District Court judge found for Gunby on the Title VII claim relying upon the res judicata effect of the jury verdict and ordered Penelectric not to discriminate against Gunby in the future, but refused any other remedy. Both parties appealed, Penelectric for the purpose of challenging the sufficiency of the evidence to support the jury verdict and Gunby for the purpose of challenging the sufficiency of the District Court's Title VII remedy.

The Third Circuit upheld the jury verdict, holding in part that the evidence supported a finding by the jury that Penelectric's alleged non-discriminatory reason for not promoting Gunby was a sham. The Circuit Court also

remanded the Title VII claim to the District Court with instructions which would require the District Judge to give Gunby a more complete Title VII remedy.

Penelectric has filed a Petition for Certiorari asking the Supreme Court to review the decision of the Third Circuit Court of Appeals on the sufficiency of the evidence to support the jury verdict.

Significantly, Penelectric has at no time, either explicitly or implicitly, challenged before the Third Circuit the efficacy of §1981 to give a private remedy to Gunby for the discrimination proven.

Penelectric, before the jury, gave as its non-discriminatory reason for failing to promote Gunby that the white candidate selected for the job had greater managerial skills than Gunby.

The Third Circuit, applying the standards as set down by the Supreme Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), held that the jury could have found from the evidence presented to it that Penelectric embarked – not upon a two-stage process of “reorganization” as represented by Penelectric (Petition, p. 3) – but upon a two-stage strategem the purpose of which was to deny to a black man a management-level EEO/AA position for which he was virtually the only qualified candidate. It did so by first inducing Gunby to accept a non-management corporate level job in personnel without telling him that it had created a management-level EEO/AA position. Penelectric

then fabricated a false, vague and uncomplimentary performance evaluation of Gunby's work, and gave the management job to a white accountant who had no prior EEO/AA experience (Gunby had nine years) and who was "shocked" to get the offer.

The Third Circuit further held that the jury could find from the evidence that Gunby's genuine performance evaluations showed Gunby to be a superior performer than the white accountant, and that Penelectric's claim that the white accountant exhibited superior management skills was a lie. The Circuit Court held that the jury could find from the evidence that Gunby had in fact exhibited better management skills than the white accountant, whose performance evaluations had been downgraded significantly in management skill areas during the period Penelectric claimed he had exhibited superior management skills.

The Third Circuit further held that the jury could have concluded from the evidence that at least one Penelectric witness (Reeseman) lied under oath by falsely claiming that Gunby had failed to obtain federal government approval for the company's EEO/AA plan when in fact written documents which the witness had signed off on showed clearly that Gunby had been successful in obtaining such approval.

In short, the Third Circuit, applying *Burdine*, supra, held that Gunby had met his burden of proving that Penelectric's alleged non-discriminatory reason for the job action was not worthy of belief and had produced additional evidence from which the jury could conclude

that Penelectric's failure to promote Gunby was motivated by discriminatory animus.

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### SUMMARY OF ARGUMENT

The decision of the Circuit Court in the instant case applied appropriate and correct standards as required by the Supreme Court of the United States in *Burdine*, supra. The Circuit Court's analysis of the evidence presented to the jury is in accordance with *Burdine* and does not conflict with other Circuit Court opinions cited by Petitioner, which opinions Petitioner, in any event, misreads. The jury verdict is fully supported by the evidence. Petitioner has failed to preserve for the purpose of its Petition the issue of the existence of a private cause of action under 42 U.S.C. §1981.

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### ARGUMENT

#### 1. The Opinion of the Third Circuit is in accord with the Decisions of This Court.

The Court of Appeals for the Third Circuit, in its analysis of the legal standards appropriate to the instant case, applied directly the law of the Supreme Court as expressed in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). (A-12, et seq.).

It did so because the evidence presented to the jury so clearly supported a finding that Defendant's proffered reasons in this case were a sham that no lessened standards were required to justify the verdict.

Petitioner's claim, therefore, at page 9 of its Petition, that the Circuit Court applied some reduced standard permitting an employee to prevail "simply by questioning either the accuracy of the reason proffered by the employer for its action, or . . . the credibility of the employer" is false.

A reading of the Court's opinion on the issue of the Plaintiff's burden of proof of pretext and intentional discrimination at page A-16 of the Petition shows clearly that the foundation of its decision was solely the *Burdine* standard.

Although the Third Circuit cited its own decision in *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987) on the burden of proof issue, that citation merely quoted the *Burdine* language.

The Third Circuit applied no new or reduced standards in this case. It merely applied *Burdine* to the facts produced before the jury. Accordingly, the decision of the Court does not vary from the law as announced by the Supreme Court and need not be reviewed.

Further, contrary to Petitioner's assertion, the instant cases raises absolutely none of the issues raised by the case of *Brieck v. Harbison-Walker Refractories, Div. of Dresser Industries, Inc.*, 822 F.2d 552 (3rd Cir. 1987), cert. granted, 108 S.Ct. 1218 (March 21, 1988)(No. 87-271).

In that case, the District Court dismissed Plaintiff's claim on a motion for summary judgment filed by Defendant. The Circuit Court reversed, holding that upon motion for summary judgment filed by the employer, a

Plaintiff defeats the motion by producing sufficient evidence from which a jury might find the employer's alleged nondiscriminatory reason to be implausible and therefore, support the inference that the employer did not act for non-discriminatory reasons. The issue to be decided relates to the burden of Plaintiff to produce admissible evidence to avoid a summary judgment.

In the instant case, the issue is whether Plaintiff produced evidence at trial sufficient to justify the finding by the jury, under the *Burdine* standard, that the employer's proffered reason for its actions was a lie.

The Third Circuit determined that he had and a review of the evidence confirms the decision.

**2. The Decision of the Third Circuit does not Conflict with Decisions by Other Courts of Appeals.**

Petitioner's contention that the opinion of the Third Circuit conflicts with decisions of other Courts of Appeals is clearly erroneous, as a review of those decisions will demonstrate.

*Irvin v. Airco Carbide*, 837 F.2d 724 (6th Cir. 1987) stands for the proposition that Plaintiff must present evidence that the reasons given by the employer are an attempt to cover up the employer's real discriminatory motive. The Third Circuit here applied the same standard.

In *Irvin* (another summary judgment case), the 6th Circuit Court, applying *Burdine*, concluded that the employee had done nothing more than deny the "proof submitted by Airco without setting forth the basis for

such a blanket denial." This denial, "without further substantiation," was deemed insufficient to raise a jury issue as to whether the employer's reason was pretextual.

In the instant case, Gunby did more than simply deny that the white candidate was more qualified by reason of alleged greater managerial ability. He proved affirmatively, as the Third Circuit recognized, by reference to employment evaluations and other evidence, that he was more qualified by reason of training and experience to perform the job and that he had more managerial ability than the white accountant who got the job. He took, as the *Irvin* court required, "the extra step of presenting evidence to show that the reasons given [were] an attempt to cover up the employer's alleged real discriminatory motive."

The Third Circuit Court required that Gunby show, as part of his ultimate burden of persuasion, that the "proffered reason is merely a fabricated justification for discriminatory conduct."

Quoting *Burdine* through *Chipollini v. Spencer Gifts*, 814 F.2d 843 (3d Cir. 1987), the Third Circuit recognized that Gunby could meet his burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Chipollini*, 814, F.2d at 898.

The standard applied by the Third Circuit, accordingly, was no different than that set forth in *Airco* or *Burdine*. The Court merely held that Gunby had in fact met the *Burdine* burden by showing convincingly that

Penelectric's proffered explanations were unworthy of belief.

The same may be said with regard to the case of *Goldberg v. B. Green & Co.*, 836 F.2d 845 (4th Cir. 1988), in which the plaintiff challenged as erroneous the decision of the employer to discharge him. In *Goldberg*, the 4th Circuit upheld the grant of a summary judgment motion against the claim of a 50-year-old employee who had been replaced by a 56-year-old. The Court noted that the Plaintiff had failed to produce *any* evidence whatsoever, other than his own unsubstantiated opinion, that he had been the victim of discrimination.

"As the district court noted," the Circuit Court wrote, "Goldberg has failed, after having been afforded full discovery, to produce *any* evidence of age discrimination. Goldberg's own naked opinion, without more, is not enough to establish a *prima facie* case of age discrimination." 836 F.2d at 848.

In the instant case, strong evidence was presented to the jury that Penelectric acted out of a motive to discriminate. That evidence was reviewed by the Third Circuit in the light of the *Burdine* standards. Penelectric's "non-discriminatory reasons" were not rejected by the jury and court simply because they were erroneous or ill-advised. They were rejected because they were found to be *untrue*. Accordingly, no conflict exists between the Third Circuit and the *Goldberg* Court.

Precisely the same analysis applies to the other cases cited by Petitioner, to-wit, *McDaniel v. Temple Independent School District*, 770 F.2d 1340 (5th Cir. 1985), *Peters v.*

-*Lieuallen*, 746 F.2d 1390 (9th Cir. 1984) and *Clark v. Huntsville City Board of Education*, 717 F.2d 525 (11th Cir. 1983).

In *McDaniel v. Temple Independent School District*, 770 F.2d 1340 (5th Cir. 1985), the Circuit Court upheld involuntary dismissal of Plaintiff's claim following the close of her case-in-chief. Accordingly, the scope of review was whether the finding of the District Court that no *prima facie* case was made out was clearly erroneous. Plaintiff contended that the employer retaliated against her by evaluating her job performance unfavorably. She contended at trial that the job performance evaluations were wrong, but she failed to prove that they were pretextual. In the instant case, as the Third Circuit correctly recognized, Gunby produced evidence from which the jury could, and did, conclude that the employer's stated reasons were pretextual, not merely erroneous.

In *Peters v. Lieuallen*, 746 F.2d 1390 (1984), the Circuit Court also reviewed a finding of the District Court under a "clearly erroneous" standard, holding in part that the fact that an employer misjudges the qualifications of an applicant does not establish a Title VII violation.

Here, of course, no question of "misjudgment" exists. Gunby produced evidence from Penelectric's own documents that Penelectric *fabricated* its proffered reason, not just misjudged Gunby's qualifications.

In *Clark v. Huntsville City Board of Education*, 717 F.2d 525 (11th Cir. 1983), the District Court had found that Defendant engaged in discriminatory conduct when it failed to follow its policy of hiring minimally qualified inside employees and hired a more qualified outside applicant. The Circuit Court reversed the District Court,

holding that the Plaintiff had not proved that the employer failed to follow its policy for discriminatory reasons rather than out of motive to hire the best qualified person.

"Even if Defendants incorrectly believed that their policy allowed consideration of relative qualifications, if they nonetheless based their decision on Todd's superior qualifications and not on Plaintiff's race, they have not violated Title VII." 717 F.2d at 528.

Again, there is simply a recognition of the difference between a proffered reason which is erroneous or ill-advised but honestly held and one which is a lie. In the instant case, Gunby's evidence supported the conclusion that Penelectric lied when it contended that the white candidate was selected because of his better managerial ability.

Petitioner's quotation from *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557 (7th Cir.) cert. denied, 108 S. Ct. 488 (1987) and citation to *Gray v. New England Telephone & Telegraph Co.*, 792 F.2d 251 (1st Cir. 1986) are equally unavailing.

In *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557 (7th Cir. 1987), the court makes the same distinction between honest mistake and discriminatory motive, holding that proof of the former is insufficient to support a Title VII claim. In the instant case, however, no "honest mistake" is involved, only a jury finding, supported by the evidence, of a fabricated reason.

In *Gray v. New England Telephone and Telegraph Co.*, 792 F.2d 251 (1st Cir. 1986), the Circuit Court also made

the distinction between an employment action that was unnecessary, unwise, arbitrary and/or motivated by ill-will and one which is a pretext for discrimination.

"It is not enough for the Plaintiff to show that the employer make an unwise business decision, or an unnecessary personnel move. Nor is it enough to show that the employer acted arbitrarily or with ill will. These facts, even if demonstrated, do not necessarily show that *age* was a motivating factor." 792 F.2d 251 (1st Cir. 1986) (Significantly, this case, relied upon by Penelectric, itself cited *Chipollini*, *supra*, at page 255).

Accordingly, the opinion of the Third Circuit in the instant case cannot be said to conflict with *Gray* since the Third Circuit found evidence to support Gunby's contention that the Penelectric's proffered reason was a *lie*, not just unwise unnecessary, arbitrary or motivated by ill-will.

Penelectric's off-repeated assertion that the Third Circuit's decision is "flatly inconsistent" with decisions in other circuits is flatly erroneous. Gunby proved by competent evidence, much of it from Penelectric's own documents and the mouths of its own witnesses, that its alleged reasons for not promoting Gunby to a management-level EEO/AA position were simply not worthy of belief. The Third Circuit Court correctly analyzed the proof in accordance with the law of the Supreme Court as set forth in *Burdine*.

### **3. A Review of the Evidence Presented Shows Clear Support for the Jury's Determination that the Employer Intentionally Discriminated.**

Petitioner's characterization of this case as one in which the Court below has interfered with "traditional

"management prerogatives" overlooks the fact that the jury had before it real evidence that the purported exercise of "management prerogative" was nothing more than an intentional and poorly disguised charade to put an unqualified white person in a job for which Gunby, a black, was virtually perfectly suited.

While no Court should countenance unnecessary judicial interference with the management decision-making process, nor should intentional race discrimination accomplished through the hypocrisy of "management prerogative" receive judicial protection.

Gunby did not simply present evidence here that the employer's proffered reason was not factually accurate. He presented evidence from which the jury could conclude that the employer's claim that the white candidate was selected because, in management's opinion, the white candidate exhibited greater management skill was a lie, *not* just inaccurate.

The Third Circuit, accordingly, as its opinion shows, did not focus on the inaccuracy of Penelectric's judgment. It focused directly on evidence that Penelectric's purported exercise of management judgment was a pretext for intentional race discrimination.

The Third Circuit focused, for example, on the evidence that the unfavorable October, 1982, performance evaluation of Gunby was a sham since at that time Penelectric had a motive to evaluate Gunby unfairly "in order to justify the fact that it had appointed a white accountant with little prior experience in personnel administration and EEO/AA to a responsible management position

in personnel for which Gunby was particularly qualified." (A-17).

The Court focused upon the vagueness of the criticism in the October, 1982, evaluation that Gunby failed to complete assignments, when contrasted with the fact the Gunby's supervisor still claimed that Gunby was a "natural" for the corporate personnel administration job which involved the administration of personnel matters for 750 corporate employees - a job not likely to be given to an employee who failed to complete assignments. (A-17).

The Court focused on the fact that Gunby's qualifications for the EEO/AA job were so far superior to the white candidate who received it that Penelectric's reasons for not giving it to Gunby were a sham. (A-18).

The Court focused on the critical issue of "management skill" upon which Penelectric had placed so much emphasis in its explanation of why Gunby did not get the job. The court simply and properly concluded, not that in its judgment Penelectric was wrong to select the white candidate, but that the jury could decide, *based on the evidence* that Penelectric's purported exercise of management judgment was not an exercise of judgment at all, but a lie to cover unlawful discrimination. (A-20). While Penelectric *claimed* that it believed the white candidate to be more qualified by reason of management ability, a comparison of its own documents, particularly performance evaluations, showed that it really believed Gunby to be better qualified by reason of management ability.

Where, for example, Penelectric had claimed that the white candidate had done a good job managing the refurbishment of the corporate offices, his written evaluations

showed that his performance had been downgraded during the refurbishment and that Gunby's contemporaneous evaluations using the same standards were so significantly better that Penelectric's testimony on the issue was not credible. (A-18).

Where Penelectric claimed in oral testimony that Gunby lacked management skills, the jury could conclude from the written evaluations (done before Penelectric had a motive to lie) that Gunby in fact had equal or better management skills than the white candidate who received the job. (A-19, 20). Again, the Court was not substituting its judgment for management. It simply decided that from the actual documentary evidence presented – documentary evidence which Gunby's own supervisors prepared before they had a motive to fabricate – the jury could conclude that Penelectric's alleged exercise of management judgment was simply a sham to cover an intentional discrimination.

Finally, the Court focused on the evidence from which the jury could conclude that Penelectric's alleged "two-stage reorganization" (p.3, Petition) was in reality "a discriminatory strategem" whereby Penelectric offered Gunby a non-managerial corporate level job and insisted upon an immediate reply while not even announcing the existence of the newly created managerial EEO/AA position until Gunby, unaware of such a position for which he was particularly suited, accepted the non-managerial position, thereby unwittingly and unintentionally removing himself from consideration for the managerial job. (A-20).

Again, the Court did not attempt to substitute its judgment for that of management. It simply concluded that the jury could find, based on all the evidence, that the so-called "two-stage reorganization" was nothing more than "a strategy designed to keep a black man from obtaining the level 20 management position." (A-20).

The Third Circuit noted (p. A-20, Petition) that "other facts support Gunby's intentional discrimination showing." Such facts could have included the following:

- (a) The white candidate who received the EEO/AA managerial job "had no experience in personnel administration or EEO/AA. [He] had worked at all times in the accounting department as an accountant"; (A-6)
- (b) The new management-level position "subsumed all of the responsibilities of Gunby's previously held EEO/AA functions"; (A-7, 10-11)
- (c) Gunby's performance evaluations were better than the white candidate's; (A-9-10)
- (d) The white candidate testified that he was "shocked" to get the job since he had never expected a job in the employment area; (A-8)
- (e) That one sequestered Penelectric witness (Reeseman) simply lied when he claimed in oral testimony that the Affirmative Action Plan and Tracking system developed by Gunby had *not* been approved by the Federal government when in fact Gunby's November, 1981, performance evaluation specifically commended Gunby for the fact that the affirmative action program *had* been approved by the Office of Federal Contract Compliance and praised him for his work as well as his good relationship with the OFCCP. (A-12)

The trial evidence, in short, strongly supported a jury finding that Penelectric was motivated by discriminatory intent and its reasons for not promoting Gunby to a level 20 management position were completely fabricated. The opinion of the Circuit Court stands for no more than that.

**4. The Circuit Court Did Not Place the Burden of Proving Lack of Discrimination Upon the Employer.**

Petitioner contends that the Circuit Court placed the burden of proving lack of discrimination upon the employer. (P. 14, Petition).

A reading of the court's opinion, however, clearly establishes this contention to be wrong. The Circuit Court did no more nor less than impose upon the respective parties their burdens according to *Burdine* and *McDonnell Douglas*, *supra*, and analyze the proven facts in light of those burdens.

Petitioner complains that the Third Circuit (1) permitted a so-called "credibility determination" to substitute for a finding of intentional discrimination and (2) ignored an alleged "finding" by the District Court judge that the October, 1982, evaluation was not improper.

The Circuit Court set out the legal standards applicable to the case at the opening of its discussion (pp. A-12 - A-13, Petition). Those standards are clearly correct, accord with the Supreme Court's previous opinions and do not conflict with standards articulated by any other Circuit Court.

The Circuit Court first determined that Gunby had clearly established a *prima facie* case and then determined that there was no question but that Penelectric had

met its burden to articulate by admissible evidence a non-discriminatory legitimate business reason for its decision (p. A-15, Petition).

At that point, Penelectric apparently assumes that no matter how lame this reason is, no matter how lacking in credibility, no matter that a jury could find its witnesses lied, it had to be believed if clothed in the guise of "management judgment." It essentially contends that it must prevail just because it claims to have exercised "management prerogative" even though the alleged factual basis of that exercise was shown, by a preponderance of the credible evidence, to be non-existent or false before a jury.

The Third Circuit did no more than apply the *Burdine* instruction that a plaintiff may meet his or her burden of demonstrating that the proffered reasons for the employer's actions were not the true reason *either* by persuading the trier of fact that a discriminatory reason more likely motivated the employer *or* indirectly by showing that the employer's proffered explanation is unworthy of credence.

Gunby showed affirmatively by a comparison of performance evaluations and by cross-examination of Penelectric's own witnesses, that Penelectric's claim that the white candidate had greater managerial ability than Gunby was simply not worthy of belief, that not only was there nothing in the white candidate's background or employee record to support his supposed managerial ability but that what there was in the record proved (1) that he did not have significant managerial ability and (2) Gunby had evidenced greater managerial ability.

Clearly, the Third Circuit (and apparently the jury) was not impressed by the credibility of Penelectric's testimony. But the evidence in support of Gunby's case was more than a credibility challenge to the employer's proffered explanation. Not only did Gunby succeed in destroying Penelectric's claims before the jury, but he presented convincing evidence that he was far and away the more qualified candidate and that he had been the unwitting accomplice to the employer's strategem to eliminate him from consideration for the management job. The bogus performance evaluation of October, 1982, created after Penelectric had a motive to lie about Gunby's qualifications, contributed to that strategem. The Circuit Court properly recognized that the *jury* could find that performance evaluation to have been falsely created, even if the District Judge disagreed. The Circuit was, after all, reviewing a jury verdict, not a non-jury Title VII finding. The Circuit could, therefore, ignore the finding of the District Judge on that issue.

In short, the Circuit Court followed scrupulously the standards of this Honorable Court as set down in *McDonnell-Douglas* and *Burdine*.

It did not place the burden of proving lack of discrimination on the employer. It simply reconized not only that Gunby had presented evidence of his employer's discriminatory motive, but that the jury could and did reasonably find that the employer's proffered explanation for its actions were unworthy of credence.

Accordingly, the Decision of the Third Circuit Court of Appeals should not be reviewed.

5. The Third Circuit Correctly Applied The Law Regarding The Scope of Private Actions Under §1981.

Penelectric's attempts to raise here, for the first time, the validity of a cause of actions under 42 USC §1981, against private employers.

Initially, Gunby would submit that Petitioner neither "explicitly" nor "implicitly" raised this issue in the forum below. Petitioner did repeatedly attack the evidence presented as being insufficient to support the verdict and award. However, this assignment of appealable error is hardly akin to attacking the validity of a cause of action in the first instance.

The Supreme Court has consistently adhered to its general rule that it will not consider issues raised for the first time in the Petition for Certiorari. *United States v. Ortiz*, 422 U.S. 891 (1975); *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19 (1986).

As with any rule, exceptions have of course, been noted.

Thus, "a prevailing party may urge any ground in support of the judgement, whether or not that ground was relied upon or even considered by the Court below." *United States v. Arthur & Co.*, 465 U.S. 805, 814, f.n. 12 (1984) (emphasis added.)

Petitioner does not intimate that it had prevailed in the earlier proceedings.

Similarly, a challenge to the subject matter jurisdiction of the Courts may be raised and addressed at any

stage of the action. Cf. *United States v. Griffin*, 303 U.S. 226 (1938).

Petitioner makes no such claim.

Instead, it has been alleged that the Third Circuit committed "plain error" in "[assuming], without discussion, that a cause of action exists against private employers under 42 U.S.C. §1981" (Petition at 18).

Presumably, the District Court committed this error in allowing the case to be tried and the Third Circuit compounded it through omitting discussion of the vitality of this Court's decision in *Runyon v. McCrary*, 427 U.S. 160 (1976).

Gunby concedes the discretionary authority of this Court to note plain errors committed and not brought to the fore by the unsuccessful litigant in the Courts below.

"In exceptional circumstances, especially in criminal cases, Appellate Courts, in the public interest, may of their own motion, notice errors to which no exception has been taken, if the errors are obvious, if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Silber v. United States*, 370 U.S. 717, 718 (1962), quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936).

It can hardly be claimed that applying the law as it existed at the time of the Third Circuit's determination (and as it exists today) is "plain error."

On the contrary, the Court has consistently reaffirmed, "the principle that a Court is to apply the law in effect, at the time it renders its decision . . ." *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974), accord

*United States v. Schooner Peggy*, 1 Cranch 103 (1801); see also, *Cort v. Ash*, 422 U.S. 66 (1975).

Pursuant to this Court's decision in *Runyon*, supra, a valid cause of action is maintainable against a private employer notwithstanding *Patterson v. McLean Credit Union*, 805 F. 2d 1143 (4th Cir. 1986), cert. granted 108 S.Ct. 65 (1987), reargument requested, 108 S.Ct. 1419 (1988).

This is *not* a situation where, like *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967), reh. den. 389 U.S. 889 (1967), the instant Petitioner should be permitted to raise this issue for the first time because the law has changed during the pendency of the action.

Since 1976, it has been the law that the cause of action sounding in a violation of §1981, may be brought against a private employer. The law was such when Respondent filed the Complaint with the District Court, when the jury returned its verdict, when the Third Circuit rendered its decision on appeal, and the law remains as such today.

Respondant thus respectfully submits that the Petition for Certiorari to the Third Circuit Court of Appeals be denied.

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### CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be refused.

Respectfully submitted,

FELDSTEIN GRINDBERG STEIN & MCKEE

BY: Stanley M. Stein, Esquire

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